



The Huntington National Bank

Legal Department
Huntington Center
41 South High Street
Columbus, Ohio 43287

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By electronic filing via <http://www.fcc.gov/cgb/ecfs/>

Marlene H. Dortch, Secretary
Federal Communications Commission

Re: CG Docket No. 05-338
Proposed Rule Pursuant to the Junk Fax Prevention Act of 2005
70 *Fed. Reg.* 75102 (Dec. 19, 2005)

Dear Ms. Dortch:

This letter is submitted on behalf of The Huntington National Bank, a national banking association (“Huntington”),¹ in response to the above referenced Proposed Rule published by the Federal Communications Commission (“FCC”) pursuant to the Junk Fax Prevention Act of 2005 (the “JFPA”). Huntington appreciates the opportunity to provide the comments set forth below with respect to this Proposed Rule.

Time Limits on Established Business Relationship for Unsolicited Facsimile Advertisements

The JFPA prohibits the FCC from establishing any time limits on the duration of an established business relationship (“EBR”) with respect to unsolicited facsimile advertisements until the FCC determines, among other things, “whether the existence of the exception under paragraph (1)(C) relating to an established business relationship has resulted in a significant number of complaints to the Commission regarding the sending of unsolicited advertisements to

¹ The Huntington National Bank (“Huntington Bank”) is a national bank and the principal subsidiary of Huntington Bancshares Incorporated, which is a \$33 billion regional bank holding company headquartered in Columbus, Ohio. Along with its affiliated companies, Huntington Bank has more than 139 years of serving the financial needs of its customers, and provides innovative retail and commercial financial products and services through more than 300 regional banking offices in Indiana, Kentucky, Michigan, Ohio and West Virginia. Huntington Bank also offers retail and commercial financial services online at huntington.com; through its technologically advanced, 24-hour telephone bank; and through its network of approximately 900 ATMs. Selected financial service activities are also conducted in other states including: dealer sales activities in Florida, Georgia, Tennessee, Pennsylvania and Arizona; private financial and capital markets group services in Florida; and mortgage banking offices in Maryland and New Jersey. International banking services are made available through the headquarters office in Columbus and an office located in the Cayman Islands and an office located in Hong Kong.

telephone facsimile machines”.² The reference to “paragraph (1)(C)” refers to the provision of the JFPA that newly creates a specific EBR exemption for unsolicited fax advertisements—a provision that has only been in place since the effective date of the JFPA, namely, July 9, 2005.

Thus, before the FCC is authorized to establish any time limits on an EBR in connection with unsolicited facsimile advertisements, the FCC must determine whether that specific exemption in “paragraph (1)(C)” has resulted in a significant number of complaints to the FCC regarding the sending of unsolicited facsimile advertisements. In the Proposed Rule the FCC states that as part of this rulemaking the FCC is seeking comment on whether to establish time limits for an EBR in connection with unsolicited facsimile advertisements. The FCC goes on to state that “[a]s part of the Commission’s review, and as required by the statute, the Commission will evaluate the Commission’s complaint data to determine whether the EBR exception has resulted in a significant number of complaints regarding facsimile advertisements, and whether such complaints involve facsimile advertisements sent based on an EBR of a duration that is inconsistent with the reasonable expectations of consumers.”³

We respectfully suggest that there has not been sufficient time for the FCC to be able to make any meaningful determination as to whether or not there have been a “significant” number of complaints arising specifically from the exemption in “paragraph (1)(C)”. The FCC’s pre-2003 interpretation—that a facsimile transmission in the context of an EBR can be deemed to be invited or permitted and is thus not unsolicited⁴—is still in effect until the conclusion of the current rulemaking under the Proposed Rule⁵, and there has thus been little reason for senders of unsolicited facsimile advertisements in the context of an EBR to use the new EBR exemption in “paragraph (1)(C)”. Thus, it is our expectation that the FCC could not have received very many (if any) complaints resulting from the use of the exemption in “paragraph (1)(C)”. Additionally, several of the items required to be contained in the opt-out notice required to be used in connection with the exemption in “paragraph (1)(C)” await definition or clarification by the FCC pursuant to this current rulemaking in connection with the Proposed Rule,⁶ which is yet another

² 47 U.S.C. 227(b)(2)(G)(i)(I). Unless otherwise noted, references herein to §227 mean as amended by the JFPA.

³ 70 *Fed. Reg.* 75102, at 75106.

⁴ See paragraph 185 of the FCC’s Report and Order, CG Docket No. 02-278, adopted June 26, 2003, released July 3, 2003.

⁵ Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Final Rule, 70 *Fed. Reg.* 75070 (Dec. 19, 2005).

⁶ See 47 U.S.C. 227(b)(2)(D): “. . . that failure to comply, within the shortest reasonable time, as determined by the Commission . . .”; and “. . . the Commission shall by rule require the sender to provide such a [cost-free] mechanism and may, in the discretion of the Commission and subject to such conditions as the Commission may prescribe, exempt certain classes of small business senders, but only if the Commission determines that the costs to such class are unduly burdensome . . .”. Additionally, §227(b)(2)(E) requires the FCC to address “by rule” certain matters with respect to opt-out requests by recipients.

reason why it is likely that senders have not yet been relying on the exemption in “paragraph (1)(C)”.

We therefore believe it is premature for the FCC as part of this rulemaking under the Proposed Rule to be seeking any comment on whether or not to limit the duration of an EBR in connection with unsolicited facsimile advertisements or to make any evaluation of complaint data in connection therewith. We believe that a reasonable period of time needs to elapse after the effective date of the final rule to be issued in connection with this current rulemaking before the FCC can reasonably be in a position to receive a “significant” number of complaints resulting from the exemption in “paragraph (1)(C)”.

Applicability of Time Limits on Established Business Relationship for Unsolicited Facsimile Advertisements to Businesses

When the FCC has had the appropriate amount of time to determine whether the EBR exemption in “paragraph (1)(C)” has resulted in a “significant” number of complaints, we believe the FCC should distinguish complaints from recipients who are consumers from complaints from recipients who are businesses. In other words, if, for example, a year after the effective date of the FCC’s final rule under this rulemaking the FCC initiates another proceeding to determine whether or not a significant number of such complaints have been made, and in fact at that time determines that a significant number of complaints have been made by consumers, but there have not been a significant number of complaints from businesses, we believe the FCC has the authority not to include business recipients within any time limits established as a result of such determination, and that the FCC should make such a distinction.

It is clear under the JFPA that an EBR in the context of an unsolicited facsimile advertisement includes a business relationship between the sender and a recipient who is a business.⁷ This is different from the EBR definition that is applicable in connection with a “telephone solicitation”.⁸ However, it is also clear from the statutory language itself that the provision of the JFPA authorizing the FCC to establish time limits on an EBR in the context of unsolicited facsimile advertisements is triggered by complaint levels associated with recipients, and it would be inconsistent with this political determination by Congress for the FCC to impose time limits on a clearly distinguishable and different class of recipients for which the requisite “significant” number of complaints was missing.

We believe there are important reasons for treating business recipients as a separate and distinct class of facsimile recipients from consumer recipients. Most (if not all) businesses utilize facsimile transmissions as either sender or recipient or both as part of the normal course of conducting their business operations, and are usually in a better position than consumers to expect and absorb the costs of, and not be inconvenienced by, sending and receiving facsimile

⁷ 47 U.S.C. 227(a)(2).

⁸ 47 C.F.R. 64.1200(f)(3).

transmissions. For example, mortgage lenders and auto finance lenders routinely send rate sheets and other information by facsimile transmission to mortgage brokers, realtors and motor vehicle dealers in connection with origination of loans or other extensions of credit to purchase a home or a motor vehicle. Depending on the circumstances or on a case-by-case basis, these facsimile transmissions may be considered to be unsolicited advertisements, and there may be varying periods of time since the sender actually had a transaction with the recipient (originated a loan from that recipient, for example). Additionally, there may or may not be formal contractual arrangements between such senders and recipients in connection with loan origination business. However, these kinds of business recipients depend significantly on the ability of their customers to obtain financing and these kinds of business recipients need the kind of information provided by lenders in order to assist their customers in obtaining financing. It would be consistent with the complaint trigger in the JFPA for the FCC to include businesses recipients such as this in any EBR time limits simply because the FCC determined that a significant number of consumers had complained about receiving facsimile transmissions pursuant to the EBR exemption in “paragraph (1)(C)”.

Moreover, if ultimately the FCC determined that there were a significant number of complaints from businesses in connection with unsolicited facsimile advertisements as a result of the EBR exemption in “paragraph (1)(C)”, we believe the FCC should *at that point in time* consider what kinds of time limits would then be appropriate in the business context, rather than simply concluding that the 18/3 month limitation that is currently in the residential telephone solicitation EBR exemption would also be appropriate in the business context. By the time such a determination might ultimately be made, business practices may have changed from what they are today—particularly if that is a period of some years—and thus it again seems premature to be considering now the kinds of EBR time limits that would be most appropriate in the business context if and when that situation ever arises. Additionally, as indicated above, there may also be a need to recognize customary business practices that rely on facsimile transmission regardless of whether or not there has been a transaction within the past 18 (or any number of) months.

Location of Opt-Out Notice

The new EBR exemption in the JFPA with respect to unsolicited facsimile advertisements requires a particular form of opt-out notice to be included “on the first page of the unsolicited advertisement”.⁹ On at least two occasions in the Proposed Rule the FCC states that the opt-out notice must be “on the first page of the facsimile”.¹⁰ We note that the first page of the advertisement could be several pages into a multi-page transmission, assuming a cover page, followed by informational pages that are not advertisements, and then finally by an advertisement. Even if the facsimile is just an advertisement, it is not clear from the statute that the cover page of the fax (assuming there is one) is the first page of the advertisement.

⁹ 47 U.S.C. 227(b)(2)(D)(i).

¹⁰ 70 *Fed. Reg.* 75102, at 75104 and 75106.

We agree with the FCC that the opt-out notice should be on the first page of the facsimile, and where a cover page is used as the first page, that the cover page should be considered to be the first page of the facsimile. Because of the ambiguity of the statutory language at this point, and because this statute may be enforced by a private right of action, we believe it would be appropriate for the FCC to clarify (i) that the FCC interprets the statutory language “first page of the unsolicited advertisement” to be the first page of the facsimile transmission and (ii) that by “first page of the facsimile” the FCC means literally the first page, meaning the cover page if that is the first page. We believe that at least one standard way businesses will comply with the opt-out notice requirement will be to develop a standard facsimile cover page to be used to send all facsimile transmissions that will contain the opt-out notice, and it would be helpful if the FCC would confirm that this is in compliance with the statutory requirement to include the opt-out notice “on the first page of the unsolicited advertisement”.

The FCC also seeks comment on how it should describe those circumstances under which an opt-out notice will be “clear and conspicuous”.

Aside from clarification of the location of the opt-out notice as discussed above, we believe it is unnecessary for the FCC to define or explain the term “clear and conspicuous”. This term has a long history in the context of consumer disclosure, and there is no further need to amplify or explain it.

“Shortest Reasonable Time”

The opt-out notice required by the new EBR exemption in the JFPA must state that the recipient may make a request of the sender not to send future facsimile transmissions and must state that “failure to comply, within the shortest reasonable time, as determined by the Commission, with such a request . . . is unlawful”.¹¹ In the Proposed Rule, the FCC has proposed 30 days as the “shortest reasonable time” and has requested comment on whether that is an appropriate time period.

We note that the existing FCC rule has a 30-day time period within which a do-not-call request must be honored,¹² and it is appropriate for the response period under the do-not-fax provisions of the rule to be the same. Having the same period will make compliance easier and promote consistency in the regulation. We therefore support the FCC’s proposal of 30 days for the “shortest reasonable time”.

¹¹ 47 U.S.C. 227(b)(2)(D)(ii).

¹² 47 C.F.R. 64.1200((d)(3).

Facsimile Numbers Obtained from the Recipient in the Context of an EBR

The FCC has asked for comment on whether it should establish parameters defining what it means for a person to provide a facsimile number “within the context of [an] established business relationship”.

We do not believe the FCC needs to establish any parameters or definitions relating to what constitutes a recipient providing a facsimile number within the context of an EBR. The statutory language speaks for itself and is clear that all that is required on this prong of the new EBR exemption is that the recipient have an EBR with the sender and voluntarily communicate his/her/its facsimile number to the sender.

Facsimile Numbers Obtained from Directories

The new EBR exemption for unsolicited facsimile advertisements in the JFPA requires that the sender obtain the facsimile number of the recipient either (i) through voluntary communication of the number by the recipient within the context of the EBR or (ii) from a directory, advertisement or Internet site in or at which the recipient voluntarily agreed to make its facsimile number available for public distribution.¹³ With respect to the latter method, the FCC has requested comment on whether it should require the sender to make reasonable efforts to confirm with the entity that compiled the numbers that the recipients have voluntarily agreed to allow them to be made publicly available.

We believe that any such requirement would not be feasible, and would have the effect of making this method of obtaining facsimile numbers essentially useless. The FCC should not require senders to play detective and conduct due diligence investigations of directories, advertisements or Internet sites to confirm voluntariness. It should be sufficient for the sender to be able to assume voluntariness unless it was manifestly unreasonable under the particular circumstances not to do so, and the FCC should leave it at that.

Subsequent Express Invitation to Receive Facsimile Advertisements

The FCC seeks comment in the Proposed Rule on situation in which a consumer that has made a do-not-fax request of a sender subsequently provides express invitation to receive facsimile advertisements from that sender.

We believe the FCC should provide for such situations. For example, a consumer who has opted out of facsimile advertisements from his/her bank may subsequently be in the market to obtain mortgage financing to purchase a home and may wish for some period of time to receive facsimile transmissions from the bank with respect to the bank’s rates or other terms of mortgage loans offered by the bank. There is a parallel to this situation already in the FCC’s rule

¹³ 47 U.S.C. 227(b)(1)(C)(ii).

with respect to express invitation by a consumer to receive telephone solicitations even though the consumer is on the national do-not-call registry,¹⁴ and that same approach would be appropriate here with respect to facsimile advertisements.

Express Invitation to Receive Facsimile Advertisements

The FCC's current rule as amended in 2003 contains §64.1200(a)(3)(i) which provides that a facsimile advertisement is unsolicited unless "the recipient has granted the sender prior express invitation or permission to deliver the advertisement, as evidenced by a signed, written statement that . . . clearly indicates the recipient's consent" The FCC is proposing to remove this provision.

We agree that the FCC should, and is required by the provisions of the JFPA to, remove this provision. The JFPA amended the term "unsolicited advertisement" to add at the end the words "in writing or otherwise",¹⁵ and thus the statute clearly does not require a writing to evidence consent. Because the statutory language "in writing or otherwise" is very broad, we believe it is not necessary for the FCC to attempt to further define the term "unsolicited advertisement" or to specify what might constitute a form of invitation or consent that would comply with this statutory language. Any such attempt to do so is likely to be an inappropriate limitation of the broad statutory wording.

Sender's Number on Opt-Out Notice

The new opt-out notice in the JFPA EBR exemption is required to contain the sender's domestic telephone and facsimile numbers that the recipient can use to transmit an opt-out request to the sender,¹⁶ and such numbers must be available at any time on any day of the week.¹⁷ Any opt-out request from the recipient must be made to such telephone or facsimile number that is in the sender's opt-out notice or "by any other method of communication as determined by the Commission".¹⁸ The JFPA also refers to having a "cost-free" mechanism for a recipient to transmit such a request to the sender.¹⁹

¹⁴ 47 C.F.R. 64.1200(c)(2)(ii).

¹⁵ 47 U.S.C. 227(a)(5).

¹⁶ 47 U.S.C. 227(b)(2)(D)(iv)(I).

¹⁷ 47 U.S.C. 227(b)(2)(D)(v).

¹⁸ 47 U.S.C. 227(b)(2)(E)(ii).

¹⁹ 47 U.S.C. 227(b)(2)(D)(iv)(II).

With respect to the “cost-free” mechanism, we believe the FCC should clarify that providing toll-free telephone and facsimile numbers in the opt-out notice satisfies this requirement.

With respect to the “any other method of communication” whereby the recipient may notify the sender that the recipient wishes to opt out, it is important that the sender be able to control the telephone and facsimile numbers or other intake points at which such opt-out requests may be made by a recipient, because the sender will have the obligation to maintain a data base of customers who opt out, which will be very difficult to do if recipients can send opt-out requests to intake points not specifically designed to capture the data to enable the sender to comply with the request within the “shortest reasonable time”. The telephone and facsimile number of the sender provided in the opt-out notice provides a reasonable and sufficient method for a recipient to communicate an opt-out request. Thus, we believe that it is not necessary for the FCC to designate any other method of communication for transmission of opt-out requests.

Duration of Opt-Out Request

We note that the provisions of the FCC’s rule governing opt-out from telephone solicitations indicates that do-not-call registrations must be honored for a period of five years.²⁰ We believe it would be appropriate to have the same period of time applicable to a do-not-fax opt-out registration.

Effective Date of Final Rule

It is important that the FCC provide adequate time for senders to come into compliance with the final rule issued in connection with this rulemaking under the Proposed Rule. As noted above on page 2 of this letter, even though the JFPA was effective last July, it is likely that most senders have not yet been using the new EBR exemption in the JFPA because of further clarifications required by the JFPA to be made by the FCC and because the FCC’s pre-2003 interpretation with respect to a facsimile transmission in the context of an EBR is still in effect until the conclusion of this present rulemaking. It will take a significant period of time to assess an organization’s facsimile practices, reach decisions on whether or not to provide an opt-out notice as a standard facsimile practice in all cases or only where the facsimile is an unsolicited advertisement, determine whether procedures should be the same across an entire organization or be permitted to vary within various departments and subsidiaries, draft and finalize the text of a standard opt-out notice, develop and implement procedures with respect to the opt-out notice process, create the back office capabilities to receive and maintain opt-out requests and train all employees with respect to the new rule. We believe it would be appropriate to have an effective date of one year from issuance of the final rule to provide adequate time for senders to come into compliance. We note that compliance with privacy opt-out requirements under the Gramm-

²⁰ 47 C.F.R. 64.1200(c)(2).

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Leach-Bliley Act required similar efforts, and the federal banking regulators provided a one-year period for coming into compliance with those rules.²¹

Thank you for the opportunity to provide these comments.

Very truly yours,

A handwritten signature in black ink that reads "Daniel W. Morton". The signature is written in a cursive, flowing style.

Daniel W. Morton
Senior Vice President & Senior Counsel

²¹ 65 *Fed. Reg.* 35162 (June 1, 2000). The final privacy rules were issued on June 1, 2000, with an effective date of November 13, 2000, but with compliance optional until July 1, 2001.